No. 91-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
HEIDI K. MCAULIFFE
MCGUINESS & WILLIAMS
Suite 1200
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	5
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REASONING IN *ALEXANDER v. GARDNER-DENVER* BY PENALIZING AN EMPLOYER FOR PROVIDING EMPLOYEES WITH AN ALTERNATIVE DISPUTE RESOLUTION PROCEDURE DESIGNED TO COMPLEMENT AND PRESERVE, RATHER THAN OVERLAP AND POTENTIALLY CONFLICT WITH, STATUTORY ENFORCEMENT PROCEDURES	8
A. The Seventh Circuit's Rule Creates a "Catch 22" for Employers Who Seek to Afford Employees Practical Alternatives to Statutory Enforcement Procedures	8
B. The Decision Below Creates a Strong Disincentive to the Use of Grievance and Arbitration Procedures to Resolve Employment Disputes, and Thus Will Seriously Burden the EEOC and the Courts by Requiring Duplicative Forums	10
II. THE SEVENTH CIRCUIT'S DECISION IS SQUARELY IN CONFLICT WITH THE LESSONS OF THE *STEELWORKERS TRILOGY*: THE SCOPE OF ARBITRATION IS A MATTER OF CONTRACT AND CANNOT BE ALTERED ABSENT AGREEMENT OF THE PARTIES	13

TABLE OF CONTENTS—Continued

Page

A. The Court of Appeals' Decision Seriously Undermines the Fundamental Principle that the Parties to a Collective Bargaining Agreement Bargain For and Consent To the Terms of the Contract 13

B. Under the Seventh Circuit's Holding, Parties to a Collective Bargaining Agreement May No Longer Designate the Specific Disputes that Are Beyond the Scope of Arbitration 16

III. EVEN IN NON-UNION SETTINGS, THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WILL RESTRICT THE ABILITY OF EMPLOYERS TO USE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES EFFECTIVELY AND WILL THEREBY CREATE A DISINCENTIVE TO THE ADOPTION OF ADR PROCEDURES 17

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Page

AT & T Technologies v. Communication Workers of Am., 475 U.S. 643 (1986) 15

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... *passim*

Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728 (1981) 18

Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991) ..... *passim*

Goss Golden West Sheet Metal v. Sheet Metal Workers, Local 104, 933 F.2d 759 (9th Cir. 1991) 15

Hotel Ass'n of Washington, D.C. v. Hotel and Restaurant Employees Union Local 25, No. 91-5112, 1992 U.S. App. LEXIS 7898 (D.C. Cir. 1992) 15

International Union of Elec. Workers, Local 790 v. Robbins & Meyers, Inc., 429 U.S. 229 (1976) 3, 15

Litton Financial Printing v. N.L.R.B., 111 S.Ct. 2215 (1991) 15

McDonald v. City of West Branch, Mich., 466 U.S. 284 (1984) ..... *passim*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 18

Montgomery Mailers' Union 127 v. Advertiser Co., 827 F.2d 709 (11th Cir. 1987) 16

New York News, Inc. v. Newspaper Guild of New York, 927 F.2d 82 (2d Cir. 1991) 16

Pipe Trades Council, Local 159 v. Underground Cont. Assoc., 835 F.2d 1275 (9th Cir. 1987) 15

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) 17

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) 17

T.C. Baer, Inc. v. Iron Workers Local Union No. 580, 813 F.2d 562 (2d Cir. 1987) 15

Teamsters Local 315 v. Union Oil Co. of California, 856 F.2d 1307 (9th Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989) 16

United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960) 13

TABLE OF AUTHORITIES--Continued

Page

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 14, 16
United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 13, 17
Van Waters & Rogers Inc. v. Int'l Brotherhood of Teamsters, Local 70, 913 F.2d 736 (9th Cir. 1990) 16

STATUTES

42 U.S.C. § 1983 8
Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sec. 621 et seq 3, 4, 16, 18
Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq. 8, 18

MISCELLANEOUS

Report of the Federal Courts Study Committee (April 2, 1990) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1895

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief, *Amicus Curiae*. Letters of consent on behalf of Petitioner, the Board of Governors, and Respondent, the Equal Employment Opportunity Commission (EEOC), have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its mem-

bership comprises a broad segment of the employer community in the United States, including over 260 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, aspects of EEO policies and requirements that apply to the employer-employee relationship.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and other various federal orders and regulations pertaining to nondiscriminatory employment practices and equal opportunity policies. In addition, as employers, many of EEAC's members maintain in-house dispute resolution procedures, including many that are products of the collective bargaining process.

In this case, the court below held that a collectively-bargained provision that made disputes non-arbitrable where employees sought administrative or judicial relief violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* As potential respondents to charges of discrimination pursuant to ADEA and other employment statutes, EEAC's members are concerned that the decision below may expose them to liability if, by collective bargaining or otherwise, they establish dispute resolution procedures that exclude from arbitration claims which a complaining party seeks to have resolved in a parallel administrative or judicial forum. Thus, EEAC members have a direct

interest in the issues presented for the Court's consideration in this case.

Because of its interest in the application of the nation's employment laws, EEAC has filed over 300 briefs as *amicus curiae* before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated as *amicus curiae* in cases involving the proper relationship between grievance and arbitration procedures and federal administrative and judicial procedures. *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984); and *International Union of Elec. Workers, Local 790 v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

Because of its experience with these issues, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to this case. EEAC's brief brings matter to the attention of the Court that has not already been provided by the party briefs.

STATEMENT OF THE CASE

The collective bargaining agreement at issue was negotiated between the Board of Governors of State Colleges and Universities (hereinafter "the Board") and the University Professionals of Illinois (hereinafter "the Union"). (Pet. App. 2-3).[1] The Agreement contains the following provision:

---

[1] Citations to the Petitioner's Appendix, including those to the decision below, are designated as Pet. App. ——.

Article 17.2

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

(Pet. App. 3).

In 1984, Professor Raymond Lewis filed a grievance with the Union, alleging that the University president's failure to recommend him for tenure was in violation of University procedures. (Pet. App. 4). An arbitration hearing to resolve Professor Lewis' grievance was scheduled for May 20, 1985. *Id.* On May 14, 1985, Professor Lewis filed a charge of age discrimination with the EEOC based on the same tenure decision. *Id.*

Pursuant to Article 17.2 of the collective bargaining agreement, the Board declined to proceed further with the arbitration procedure. *Id.* Thereafter, the EEOC brought this action against the Board, alleging that its policy, embodied in Article 17.2, violated the non-retaliation provision of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.* (Pet. App. 5).

The trial court concluded that Article 17.2 was valid in the absence of evidence that the provision was adopted with intent to retaliate and granted summary judgment for the Board. (Pet. App. 20). The Court of Appeals for the Seventh Circuit reversed. (Pet. App. 17). Declaring that the motivation of the employer is irrelevant to a claim of retaliation the

Seventh Circuit remanded the case, ordering injunctive relief in favor of the EEOC. (Pet. App. 17).

Judge Manion, although concurring in the opinion of the court, recognized the injustice the decision would produce.

> [T]he advantage of the grievance procedure . . . was that a just result could be achieved without literally making every employment dispute a federal case. This procedure would be a much less expensive and probably more efficient method to resolve disputes . . . the EEOC's approach will eliminate the contractual grievance procedure as a viable option for a Union member to use as an alternative means to resolve a dispute.

(Pet. App. 18-19).

SUMMARY OF REASONS FOR GRANTING THE WRIT

It makes no practical sense to require that a single employment dispute be processed simultaneously through two procedures. Recognizing this, many employers, independently or through collective bargaining, have structured workplace dispute resolution procedures so that they can be suspended or discontinued if the complaining party elects to pursue the matter in another forum. This spares the parties unnecessary expense and duplication of effort and eliminates the prospect of conflicting results.

Placing such practical limitations on the use of an internal dispute resolution procedure in no way retaliates or discriminates against employees who choose to file charges with the EEOC. It simply affords all employees an internal procedure that can be used whenever it has not been rendered redundant by the initiation of proceedings in a parallel forum.

This accommodation is particularly appropriate in cases involving claims of employment discrimination in light of this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), holding that arbitration decisions cannot preclude relief under federal anti-discrimination laws. Given those holdings, an employer may reasonably conclude that it is pointless to proceed with arbitration of an issue that has been made the subject of an EEOC charge or court complaint, because arbitration in such circumstances cannot provide what many would view as an essential ingredient of effective dispute resolution—*i.e.*, finality.

The court of appeals' decision in this case, however, denies employers and unions the option of agreeing to limit an internal arbitration system to complaints that have not been made the subject of external agency or court proceedings. In doing so, the Seventh Circuit's reasoning effectively converts the internal dispute resolution procedure the parties negotiated from the *alternative* procedure they envisioned to a *duplicative* one that must be carried out even when potentially dispositive, parallel proceedings are underway. Thus, the decision below undermines the basic principle of the *Steelworkers Trilogy* that it is up to the parties to decide what types of claims they wish to submit to arbitration, and under what circumstances.

As Judge Manion noted in his concurrence below, if an employer can be compelled by the risk of liability under an anti-discrimination statute to continue with a dispute resolution hearing even after the employee has sought redress from the EEOC or in court, many

employers may opt to forgo making alternative forums available at all. (Pet. App. 19.) Thus, if allowed to stand, the Seventh Circuit's decision will thwart the development and use of alternative dispute resolution in the employment context. The decision below thus raises important issues in the administration of the federal anti-discrimination statutes that only this Court can now resolve.

Moreover, this case presents an opportunity for the Court to provide much-needed further guidance concerning issues addressed last term in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991). By appearing to encourage greater use of arbitration for the resolution of employment discrimination issues without overruling or expressly modifying *Gardner-Denver* and its progeny, the *Gilmer* decision sent mixed signals to employers about the extent to which arbitration or other dispute resolution procedures may provide viable alternatives to administrative and judicial procedures. Many employers now are very interested in offering employees the option of agreeing voluntarily to the use of alternative dispute resolution procedures. If widely adopted, such procedures could greatly reduce the volume of employment discrimination litigation in the courts. Efforts to develop such programs, however, have been hampered by remaining doubts and uncertainties concerning their efficacy in the wake of *Gilmer*. Many of the questions left unanswered in *Gilmer* could be addressed in the context of this case. For all of these reasons, the writ should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REASONING IN *ALEXANDER v. GARDNER-DENVER* BY PENALIZING AN EMPLOYER FOR PROVIDING EMPLOYEES WITH AN ALTERNATIVE DISPUTE RESOLUTION PROCEDURE DESIGNED TO COMPLEMENT AND PRESERVE, RATHER THAN OVERLAP AND POTENTIALLY CONFLICT WITH, STATUTORY ENFORCEMENT PROCEDURES.

A. The Seventh Circuit's Rule Creates a "Catch 22" for Employers Who Seek to Afford Employees Practical Alternatives to Statutory Enforcement Procedures.

In *Alexander v. Gardner Denver Co.*, this Court held that Congress intended federal courts to exercise final responsibility for enforcing the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, and that arbitration pursuant to a collective bargaining agreement could not preclude an individual's recourse to the courts for resolution of Title VII rights. 415 U.S. at 56. Similarly, in *McDonald v. City of West Branch*, this Court held that an arbitrator's award could not preclude a claim for judicial relief under 42 U.S.C. § 1983. 466 U.S. 284 (1984.) In the case at bar, however, the Seventh Circuit held that a grievance and arbitration procedure designed to yield to statutorily-created administrative or judicial procedures whenever they have been invoked by a complaining party is retaliatory and unlawful. (Pet. App. 16-17).

Taken together, these decisions create a practical dilemma for employers who wish to make arbitration or other internal dispute resolution procedures available to employees as an alternative to statutory en-

forcement proceedings. Under the Seventh Circuit's decision, if an employer provides such internal procedures at all, it must allow employees who invoke them to pursue their claims through those procedures all the way to completion, even when the same claims have been made the subject of statutory proceedings. Yet, under this Court's decisions in *Gardner-Denver* and *McDonald*, arbitration or other internal procedures cannot produce a dispositive resolution of a claim involving issues of discrimination in such circumstances.

Thus, employers in the Seventh Circuit are placed in the untenable position of being compelled, upon pain of liability under federal anti-discrimination statutes, to process complaints through internal procedures that have been rendered both duplicative and potentially inconclusive by reason of parallel statutory proceedings. And since the EEOC also subscribes to the Seventh Circuit's reasoning, the same dilemma will face employers throughout the nation unless this Court grants the writ and overturns the decision below.

"Alternative dispute resolution" (ADR) will be rendered a misnomer if this decision stands. An employer cannot offer arbitration as an *alternative* to EEOC or court procedures, but only as an additional, overlapping means of pursuing a complaint. The irony of this dilemma is that, under the reasoning of the Seventh Circuit and the EEOC, it is the employer's deference to the statutorily-prescribed enforcement procedure that places the employer in violation of the anti-retaliation provisions of the very statute whose procedures the employer was trying to preserve.

To be sure, some employers and unions may conclude that it is worthwhile to proceed with the processing of grievances through arbitration even though the issues involved have been made the subject of parallel statutory proceedings. For example, the discrimination issues may be closely intertwined with contractual issues that can be resolved only through arbitration. Or the parties may decide to proceed in the hope that an arbitrator's decision, although not preclusive, may be given substantial evidentiary weight in any subsequent judicial proceedings involving the same matter. *See Alexander v. Gardner-Denver*, 415 U.S. at 60 n.21.

In many other instances, however, it may reasonably be concluded that there will be nothing to be gained by continuing to process a case through an internal complaint procedure after external proceedings have been launched. Thus, it is entirely logical and proper for employers and unions to agree, as did the parties in the case at bar, that when statutory charges of discrimination have been filed, internal procedures will be suspended or terminated and the matter will be left to the statutorily-prescribed administrative and judicial processes for resolution.

B. The Decision Below Creates a Strong Disincentive to the Use of Grievance and Arbitration Procedures to Resolve Employment Disputes, and Thus Will Seriously Burden the EEOC and the Courts by Requiring Duplicative Forums.

To say that the Seventh Circuit's decision in this case provides "no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum" (Pet. App. 19) is a monumental understatement. The decision provides a powerful *disincentive*

to any employer to agree to provide dispute resolution procedures through which employees could raise any issue that might also be made the subject of a charge under one or more anti-discrimination laws. For to do so would almost certainly invite substantial expenditures of time and money to process complaints through a procedure which, under the Seventh Circuit's ruling, could not be suspended or terminated until it had run its full course, and yet could not produce a dispositive resolution of the issues.

Moreover, the availability of dual forums, with different procedural requirements and factfinders, to resolve disputes based on the same or similar facts will surely result in inconsistent rulings in many cases. If the Seventh Circuit's decision in this case is allowed to stand, the parties to such actions will then be forced to litigate the question of which results should be carried out and implemented.

Thus, if, as the Seventh Circuit and the EEOC reason, employers who offer arbitration procedures will face liability for retaliation if they do not allow the use of such procedures for matters being pursued simultaneously through statutory procedures, it may fairly be predicted that most employers will opt not to make such in-house procedures available at all.

This unfortunate result was correctly foreseen by the concurring judge in this case:

> [T]he EEOC's approach will eliminate the contractual grievance procedure as a viable option for a Union member to use as an alternative means to resolve a dispute. Without Article 17.2, the [employer] has no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum. As it is, the collective

> bargaining agreement would offer an incentive to both sides to resolve the issue quickly, before statutes of limitations or other time limits expire. If the grievance procedure wasn't working, the Union member could turn to the courts (or some other form of arbitration), thus overriding the grievance procedure. Now, the Union member will be permitted to operate in two forums, and presumably take the best deal. But the [employer] may see no benefit in doubling its exposure and adding to the costs of its administrative and legal defense. Thus, [the employer] could conclude that if court action must be an alternative, it will be the only alternative. It seems to me that this rigid result was not really the goal of our federal laws against discrimination. (Pet. App. 19).

Given the rate at which employment discrimination cases are contributing to the rapidly growing caseload problems of the federal judiciary,[2] and the valuable role that grievance and arbitration procedures could play in helping to alleviate those problems, to condone such a result would be irresponsible. These compelling public policy considerations add further support to the arguments for granting the writ and reversing the decision of the Seventh Circuit in this case.

---

[2] The Federal Courts Study Committee observed in a report published two years ago that the number of employment discrimination cases filed in the federal courts had already increased by over *two thousand percent* since 1969. Report of the Federal Courts Study Committee at 61 (April 2, 1990). Given the passage of the Civil Rights Act of 1991, and the impending July 26, 1992, effective date of the Americans with Disabilities Act, we can anticipate a further substantial increase in the amount of litigation in the federal courts.

II. THE SEVENTH CIRCUIT'S DECISION IS SQUARELY IN CONFLICT WITH THE LESSONS OF THE *STEELWORKERS TRILOGY*: THE SCOPE OF ARBITRATION IS A MATTER OF CONTRACT AND CANNOT BE ALTERED ABSENT AGREEMENT OF THE PARTIES.

A. The Court of Appeals' Decision Seriously Undermines the Fundamental Principle that the Parties to a Collective Bargaining Contract Must Consent to the Terms of the Contract.

The teachings of the *Steelworkers Trilogy*, three decisions in which this Court delineated and underscored the importance of grievance arbitration in the collective bargaining arena, indicate that arbitration is a consensual arrangement between the parties and that the parties must negotiate and agree which disputes will be submitted to grievance arbitration.

In *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 564-566 (1960), an employer refused to arbitrate a grievance, arguing that the dispute was not arbitrable under the collective bargaining agreement. After examining the content of the collective bargaining agreement that the parties had negotiated, Justice Douglas, writing for the Court, indicated that arbitration should have been ordered because "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *Id.* at 567.

In a dispute over the "contracting out" provisions of a collective bargaining agreement, this Court again looked to the agreement that was negotiated between the parties and ordered the matter to proceed to arbitration. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Justice Douglas, again speaking for the Court,

wrote: "*Apart from matters that the parties specifically exclude*, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration of the collective agreement." *Id.* at 581 (*emphasis added*). Emphasizing the consensual nature of an arbitral process, this Court stated that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 582.

The last *Steelworkers* case in the trilogy addressed the issue of judicial review of the arbitrator's award. In *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960), this Court again emphasized that the parties' contractual agreement was the defining event, holding that the parties had contracted for the arbitrator's judgment and that the courts were not to reject that judgment merely because they disagreed with the interpretation of the arbitrator.

The Seventh Circuit's decision in this case completely ignores the fact that the parties have agreed, through the collective bargaining process, not to arbitrate discrimination claims where charges involving the same subject matter have been formally initiated in an administrative or judicial forum. In essence, the parties have deemed these disputes to be non-arbitrable. Because the Seventh Circuit's decision squarely conflicts with the longstanding and venerable principles articulated in the *Steelworkers Trilogy*, employers who are parties to such collectively-bargained agreements in the Seventh Circuit face a real quandary as to the extent to which they may rely upon those agreements' terms to govern the scope of their arbitration rights and obligations.

In *AT & T Technologies v. Communication Workers of Am.*, 475 U.S. 643 (1986), this Court recently re-emphasized that the consensual agreement negotiated between the parties is the anchor in the collective bargaining arena. Similarly, in *Litton Financial Printing v. N.L.R.B.*, a post-contract expiration case, this Court again stated "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration *only if he has contracted to do so.*" 111 S.Ct. 2215, 2222 (1991) (*citing, Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)) (*emphasis added*). Thus, this Court has consistently held that arbitration is a matter of consent and that it will not be imposed upon parties beyond the scope of their agreement.[3]

---

[3] The lower courts have followed this Court's guidance. For instance, the parties to a collectively-bargained contract may agree that the question of arbitrability may be determined by an arbitrator. *Pipe Trades Council, Local 159 v. Underground Cont. Assoc.*, 835 F.2d 1275 (9th Cir. 1987); *Montgomery Mailers' Union 127 v. Advertiser Co.*, 827 F.2d 709 (11th Cir. 1987). They also may agree on time limitations and other procedural requirements. *Goss Golden West Sheet Metal v. Sheet Metal Workers, Local 104*, 933 F.2d 759 (9th Cir. 1991). Provisions requiring parties to a collectively-bargained contract to turn over "any and all records reasonably necessary" for an audit under the agreement may be included, *T.C. Baer, Inc. v. Iron Workers Local Union No. 580*, 813 F.2d 562 (2d Cir. 1987), as well as the issue of whether an arbitrator may be bound by the decision of a predecessor arbitrator. *Hotel Ass'n of Washington, D.C. v. Hotel and Restaurant Employees Union Local 25*, No. 91-5112, 1992 U.S. App. LEXIS 7898 (D.C. Cir.). Indeed, this Court has intimated that the parties to a collective bargaining contract may even designate in the contract the relevant "event" for purposes of a statutory cause of action. *See International Union of Elec. Workers v. Robbins & Myers, Inc., supra.*

A corollary to the principle that the parties' agreement controls the scope of the arbitration is that where the collective bargaining provision establishes a limit on the arbitrator's power to resolve disputes, an arbitrator is confined to the interpretation and application of the agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Thus, pursuant to the parties' agreement, some specific disputes will not be subject to resolution through the grievance and arbitration process. *See Van Waters & Rogers Inc. v. International Bhd. of Teamsters, Local Union 70*, 913 F.2d 736, 740 (9th Cir. 1990) ("[jurisdictional issues] shall not be submitted to arbitration under this agreement . . ."); *New York News Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991) (the dispute at issue did not arise under the "narrow" arbitration clause); *Teamsters Local 315 v. Union Oil Co. of California*, 856 F.2d 1307 (9th Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989) (no agreement to arbitrate employer's authority to determine the medical fitness of an employee to work); and *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709 (1th Cir. 1987) (where agreement is silent, the issue is beyond the scope of the arbitration clause).

B. Under the Seventh Circuit's Holding, the Parties to a Collective Bargaining Agreement No Longer May Designate the Specific Disputes that Are Beyond the Scope of Arbitration.

In this instance, the Seventh Circuit erroneously held that Article 17.2 violated the retaliation prohibition of the ADEA because it incorrectly interpreted the provision as a broad policy conferring arbitrable status on *all* employment disputes, i.e., a "contractual right to a grievance proceeding." (Pet. App. 12).

Under the collective bargaining agreement negotiated between the Board and the Union in this case, there was no contractual right to arbitrate a dispute in which the employee was seeking an administrative or judicial resolution. In Article 17.2, "the parties specifically exclude[d]" from arbitration, disputes in which an administrative or judicial resolution is sought. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

As such, if left unaddressed, the Seventh Circuit's decision threatens to undermine employers efforts to craft arbitration systems under the *Steelworkers* cases and add to the confusion that has already been generated by this Court's discussion of arbitration systems in *Alexander v. Gardner-Denver* and *Gilmer*.

III. EVEN IN NON-UNION SETTINGS, THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WILL RESTRICT THE ABILITY OF EMPLOYERS TO USE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES EFFECTIVELY AND WILL THEREBY CREATE A DISINCENTIVE TO THE ADOPTION OF ADR PROCEDURES.

The Seventh Circuit's decision in this case—requiring continuation of a grievance and arbitration procedure even where an employee initiates a parallel administrative action—will have far reaching effects on employers with non-union workforces as well as unionized employers. Propelled by recent decisions of this Court encouraging the use of alternative means of dispute resolution, *see Gilmer v. Interstate/Johnson Lane Corp., supra.; Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), many employers currently are attempting to determine whether to adopt alternative dis-

pute resolution systems to resolve disputes involving the terms and conditions of employment, and issues of employee selection such as hiring, promotion, and discharge.

In endorsing the use of arbitration in these cases, this Court embraced the view that arbitration offers businesses and individuals predictability and efficiency in their relationships. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 638 (1985). In contrast to the concerns expressed in *Gardner-Denver* and its progeny about the adequacy of collectively-bargained arbitration to resolve statutory discrimination claims,[4] this Court more recently has rejected arguments that individual arbitration agreements cannot sufficiently or adequately be used to resolve statutory claims. *Gilmer v. Interstate/ Johnson Lane Corp.*, 111 S. Ct. at 1654.

At the same time, however, *Gilmer* left open the question of whether its holding applied generally to "employment contracts" or is limited to the securities industry. *See* 111 S. Ct. at 1651 n.2. *Gilmer* also left open the degree to which private arbitration systems must duplicate the procedural and remedial schemes of a statute such as the ADEA or Title VII. As in the collective bargaining context, when an EEOC charge is filed, many employers may find it advisable to have the same claims resolved by the EEOC and the courts rather than take the chance that their ADR procedures may not be binding under standards yet to be determined by this Court.

---

[4] *See Alexander v. Gardner-Denver*, 45 U.S. at 56-57; *McDonald v. City of West Branch, Mich.*, 466 U.S. at 290-292; and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742-744 (1981).

Despite these uncertainties, many employers have established ADR procedures for non-union workforces. One important consideration is whether this alternative system will subject employers to a separate forum that may duplicate or conflict with existing statutory procedures. Often, such arbitration or other dispute resolution procedures provide that where employees have initiated a statutory claim in an administrative or judicial forum, those claims should be resolved through the administrative or judicial process and not by an alternate procedure. The Seventh Circuit's decision in this case, however, will prevent employers from doing so. For, although this case involves a grievance and arbitration provision of a collectively-bargained contract, the underlying rationale of the Seventh Circuit's decision and the EEOC's policy would appear equally applicable to non-union alternative dispute resolution procedures.

The decision below, therefore, inevitably will discourage employer attempts to utilize alternative dispute resolution procedures, because it will allow them no way of discontinuing such procedures when duplicative EEOC or court proceedings are begun. Thus, Judge Manion's admonition that employers will have "no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum" applies as well to an arbitration system adopted outside the collective bargaining context. (Pet. App. 19).

CONCLUSION

In light of the foregoing, EEAC respectfully submits that the petition for writ of certiorari should be granted so that this Court may issue some guidance to employers seeking to use alternative means of dispute resolution and comply with this Court's rulings in *Alexander v. Gardner-Denver*, *Gilmer*, and the *Steelworkers Trilogy*.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
HEIDI K. MCAULIFFE
MCGUINESS & WILLIAMS
Suite 1200
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record